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No. 88-1751

In The

# Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL,

*Petitioner,*

v.

PORTLAND AUDUBON SOCIETY, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

### I

### THIS *IS* AN APPROPRIATE CASE FOR THE COURT TO DETERMINE THE RELATIONSHIP BETWEEN RULE 24 INTERVENTION AND ARTICLE III STANDING

It is the petitioner's unequivocal position that the Ninth Circuit, in the opinion below, has erroneously equated the intervention standard under Rule 24(a)(2) with standing under Article III. Respondents seek to refute this view of the Ninth Circuit decision with a disingenuous argument that relies on a less than frank

presentation of that court's opinion. *See* Opinion at 4-5. Respondents cite only part of the court's footnote that addresses this issue for their position that the court has not incorporated an independent standing inquiry into the circuit's intervention test. *Id.*

A complete reading of the footnote, however, puts the record straight and reveals what the court has in fact decided. That portion of the footnote which respondents neglected to cite reads:

> "However, the standing requirement is at least implicitly addressed by our requirement that the applicant must 'assert an interest relating to the property or transaction which is the subject of the action.' " Petition Appendix at A-15.

The Ninth Circuit has implicitly required Article III standing status for intervention as of right. But respondents ask this Court to look only at the form of the decision below so as to deter it from seeing the substantive result of the case. *See* Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (Opposition) at 5. The Ninth Circuit denied petitioner the right to intervene to argue National Environmental Policy Act (NEPA) issues because, in the words of the court, petitioner's economic claim "has no relation to the interests intended to be protected by the statute at issue – in this case, NEPA." *See* Petition at Appendix A-18. The only protectable intervention interest the court found under this environmental statute was an environmental interest. However, if petitioner had asserted a legitimate environmental interest, petitioner would have had *standing* to enter the case. Obviously, the Ninth Circuit has equated intervention with standing.

Ironically, the respondents' opposition verifies that this was the intention of the court. Respondents cite no less than nine circuit cases on *standing* under NEPA for their proposition that an economic interest is not a protectable *intervention* interest. *See* Opposition at 10-11. This is the same *standing* argument that respondents made to and which was accepted, in principle, by the Ninth Circuit.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), this Court made it clear that Article III standing requires an injury with a nexus to the substantive character of the statute at issue. The Ninth Circuit's intervention standard under Rule 24 requires no less. This case, therefore, cries out for review.

Respondents referred to, and agreed with, this Court's conclusion in *Diamond v. Charles*, 476 U.S. 54, 68-69 n.21 (1986), that the various Courts of Appeals "have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing." *See* Opposition at 4-5. It would be anomalous for this Court to reach such a conclusion and then refuse to address the issue when it is squarely presented, as in this case.

This invidious Ninth Circuit decision not only underscores the anomalous decisions of the Courts of Appeals but, by virtue of its implicit rather than explicit holding, it intensifies the need for this Court to clarify what has become a confusing and uncertain, but undeniably important, area of the law.

Besides the need that exists for this Court to resolve the conflicting precedents of the Courts of Appeals, there is a strong public policy reason for the Court to address this issue now. This Ninth Circuit decision, among other circuit decisions, unfairly and unjustifiably denies industry and citizen groups even a chance to protect their legitimate interests in most environmental litigation. Ironically, those who may suffer the greatest personal loss and whose lives are the most directly and inalterably changed by the outcome of the case are denied a voice that even the birds and the trees are granted. Surely this draconian limitation on citizen rights is not a just or desirable result.

## II

## THERE *IS* A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE REQUIREMENT FOR RULE 24 INTERVENTION MUST BE THE SAME AS ARTICLE III STANDING

As previously noted above, respondents have already acknowledged, along with this Court, the very real conflict among the Courts of Appeals on the intervention versus standing issue. *See Diamond v. Charles*, 476 U.S. at 62 n.21. But respondents refute that there is a conflict between the Ninth and Tenth Circuits. Contrary to its plain language, respondents argue that the Tenth Circuit's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978), does not stand for what petitioner says it does. *See* Opposition at 6.

Unfortunately, respondents have misrepresented petitioner's position in this case and its interpretation of

*Natural Resources*. *See* Opposition at 5-9. Petitioner does not believe nor has it argued, as respondents suggested it had, that a mere economic interest standing alone is enough to satisfy Rule 24(a)(2). *See* Opposition at 6. Rather, the position taken by petitioner is that if all the other elements of Rule 24(a)(2) are met, an economic interest is a sufficient protectable interest to warrant intervention. Petitioner's understanding of *Natural Resources*, quoted only in part and out of context by respondents in their Opposition at 6, is that "the Tenth Circuit found that a decision in favor of plaintiffs could have a substantial [economic] effect on the applicants and that satisfied the interest test." Petition at 7.

Petitioner has not taken the extreme position erroneously ascribed to it by respondents. Petitioner agrees that such a position would indeed be absurd. However, respondents and the Ninth Circuit have taken an extreme position. They are of the opinion that even when all other elements of Rule 24(a)(2) are met, an economic interest will never be a sufficiently protectable interest to warrant intervention in a NEPA, or any other, environmental case. *See* Opposition at 5-9. This position, contrary to petitioner's, *is* absurd.

Clearly, petitioner would have received different treatment in the Tenth Circuit under *Natural Resources* than it did in the Ninth Circuit in this case. In the Tenth Circuit petitioner's timber lease interest would have been held a protectable interest like that of the American Mining Congress' mineral license interest. But respondents assert without explanation that the Tenth Circuit has

more recently rejected this concept of a protectable interest in the case of *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849 (10th Cir. 1981). *See* Opposition at 6.

That is simply not true. In *Rosebud* the Tenth Circuit *reconfirmed* its decision in *Natural Resources* that a lease interest is a protectable interest under NEPA. *Id.* at 850-51 n.3. The facts of *Rosebud* were entirely unlike the facts either in *Natural Resources* or in this case. In *Rosebud* the movant sought to intervene in a contract dispute between the government and a lessee. But the court found that the movant had no privity of contract and could not, therefore, intervene. The government had not been challenged, as in the present case, for failure to comply with a statute. The case is grossly inapposite.

A more recent and more apposite Tenth Circuit case is *Sanguine, LTD. v. United States Department of Interior*, 736 F.2d 1416 (10th Cir. 1984). This case involved a challenge by an oil and gas exploration company against the government for failure to comply with specified lease terms on restricted Indian lands. Certain Indian landowners moved to intervene to protect their economic interest derived from the leasing of their lands for exploration and mineral production. After finding that the potential intervenors had met all of the other elements for Rule 24(a)(2) intervention, the court referred to *Natural Resources* as a similar situation and ruled that the intervenors' economic interest *was* a protectable interest. *Id.* at 1420.

In the present case, the Ninth Circuit found that petitioner met all of the elements of Rule 24(a)(2) intervention with the exception of a protectable interest. This

is evidenced by the fact that the Ninth Circuit allowed petitioner to intervene in the case but restricted petitioner from arguing the NEPA issues and the fact that the court discussed only the protectable interest element in its decision. *See* Petition Appendix at A-14-18. Clearly, had the Ninth Circuit followed the Tenth Circuit view that "[t]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," *see Sanguine*, 736 F.2d at 1420, the Ninth Circuit would have granted petitioner leave to intervene as of right. But the Ninth Circuit has only given lip service to this policy which underlies the "interest" requirement of Rule 24(a)(2). By refusing to put this policy into practice the Ninth Circuit has put itself squarely at odds with the Tenth and other circuits. This condition necessitates review by this Court.

## III

## NEPA *IS* INTENDED TO PROTECT ECONOMIC INTERESTS

Respondents claim that NEPA is concerned "exclusively with the environmental consequences of agency actions." *See* Opposition at 10 n.6. This claim is false. Not only is this claim without judicial or legislative support, but it contradicts the clear and unambiguous language of the statute and its implementing regulations.

NEPA requires, by its terms, that a variety of factors be taken into account and that there be a balancing of environmental and other values in the environmental impact statement process. The very provision relied upon

by respondents to argue the contrary states with certainty that environmental values must be considered "in decisionmaking *along with economic* and technical considerations." 42 U.S.C. § 4332(b) (emphasis added).

Respondents have not in any way contradicted the other provisions of NEPA which state with equal or greater clarity that economic interests are as much a value to be protected by NEPA as the environment.

> "The Congress . . . declares that it is the continuing policy of the Federal Government . . . to foster and promote the *general welfare*, to create and maintain conditions under which man and nature can exist in *productive* harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added).

Lest there be any doubt about the true purpose of NEPA, the Council on Environmental Quality has promulgated regulations which require the consideration of economic and social effects of agency actions.

> "When an environmental impact statement is prepared and economic or social and natural or physical effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment." 40 Fed. Reg. 1508.14 (in part).

The claim by respondents that NEPA is intended to protect environmental values to the exclusion of all other interests, even economic, simply flies in the face of the plain meaning of the statute and defies common sense. *See* Opposition at 10 n.6. NEPA protects both environmental values *and* economic values. It mandates that these competing interests be balanced. The true balancing

purposes of NEPA cannot be realized unless and until petitioner, the sole representative of economic interests, is allowed to intervene.

## CONCLUSION

The challenged opinion and the pleadings filed by each side suggest a legitimate and urgent need for this Court to review and correct this unfair and damaging precedent. For these reasons the Court should grant the Writ of Certiorari petitioned for.

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Respectfully submitted,

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